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No. 91-96

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In The

Supreme Court of the United States

October Term, 1991

DAVID G. LUPO, JAMES STEMMLER, JANE S. TSCHUDY, THOMAS W. YAGER, MICHAEL J. KICKHAM, E. LOUIS WERNER, AND RONALD B. BURT,

Petitioners,

v.

IRVING COHEN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT IRVING COHEN IN OPPOSITION

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QUESTION PRESENTED

Did the Eighth Circuit correctly rule that an action for malicious prosecution is not barred under the doctrine of *res judicata* by a prior application for Rule 11 sanctions in the underlying lawsuit?

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT IRVING COHEN IN OPPOSITION

INTRODUCTION

This case presents the question of whether a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure operates to bar a subsequent diversity suit for malicious prosecution. The Eighth Circuit answered that question in the negative, holding that "Rule 11 cannot abridge the substantive state law of malicious prosecution, nor was it adopted to serve as a surrogate for an action based upon a claim of malicious prosecution

resulting from frivolous harassing or vexatious litigation." (4a)[1] The decision below was a correct application of well-settled *res judicata* principles; it raises no novel question warranting plenary review by this Court.

STATEMENT OF THE CASE

Respondent Irving Cohen's malicious prosecution claim is based on a frivolous thirteen-count complaint filed against him in 1982 by attorneys David A. Lupo and James Stemmler on behalf of eight individual plaintiffs (the "*Bastien* case"). After four years of discovery the trial court granted summary judgment in favor of respondent and every other defendant, finding that plaintiffs had no probative evidence to support any of their allegations. *Bastien v. R. Rowland & Co.*, 631 F. Supp. 1554 (E.D. Mo. 1986), *aff'd*, 815 F.2d 713 (8th Cir. 1987), *cert. denied*, 484 U.S. 854 (1987). The court explained (at 1559):

> Since the essence of defendant's motions [for summary judgment] lay in plaintiffs' failure to produce any evidence in support of their claims, the Court admonished plaintiffs to come forward at the outset of trial with *anything* that would satisfy the Rule 56(e) burden on a non-moving party on motion for summary judgment.
>
> Trial proceeded for three-and-a-half days, during which time plaintiffs completed the direct examination of one witness. At that point the Court recessed the action. Plaintiffs were

[1] The reference in the text is to the Appendix to the Petition for Writ of Certiorari.

> granted an additional ten days to file materials in opposition to defendants' motion prior to a hearing on March 31st. At the hearing plaintiffs argued fervently for their legal theories but once again failed to come forward with any evidence that supported any underlying fact of their complaint. The court therefore granted defendants' motions from the bench. [emphasis in original.]

Cohen and the other *Bastien* defendants then jointly moved for an award of Rule 11 sanctions against the Lupo & Stemmler lawyers and the *Bastien* plaintiffs. The court granted that motion. *Bastien v. R. Rowland & Co.*, 116 F.R.D. 619, 621 (E.D. Mo. 1987), *aff'd sub nom., Lupo v. R. Rowland & Co.*, 857 F.2d 482 (8th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989). (41a) Finding that after the *Bastien* case was assigned to him in 1985, the litigation had been "conducted . . . in a manner that escalated costs unnecessarily and vexatiously," *id.* at 621 (42a), District Judge Gunn decided that "a partial fee award is appropriate in this case." *Id.* at 620. (40a)

In reaching that result, Judge Gunn specifically declined to make findings as to the reasonableness of the attorney's fees and litigation expenses incurred by Irving Cohen. Fixing the aggregate sanction payable to all 32 defendants at $100,000, Judge Gunn held –

> $100,000 represents a fraction of the fees and costs in this suit. The Court will not, therefore, engage in a determination of the reasonableness of particular fees and costs charged to its defense. The Court finds the amount *appropriate as a sanction* for bad faith conduct on the part of plaintiffs and their counsel.

116 F.R.D. at 622. (43a) (emphasis added.)

On appeal, the Eighth Circuit affirmed. The appellate court held that "[o]ur review of the facts reveals overwhelming support for the imposition of the sanctions," and found that their amount "was certainly well within the parameters of reasonability. . . . " *Lupo v. R. Rowland & Co.*, 857 F.2d 482, 486 (8th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989). (34a)

Thereafter, in October 1988, respondent Cohen filed the instant malicious prosecution lawsuit against the *Bastien* plaintiffs and their attorneys. The district court dismissed the complaint, finding that the claim was barred by *res judicata*. The Eighth Circuit reversed concluding that Cohen's malicious prosecution claim was not actually litigated and could not have been properly raised and determined in the *Bastien* litigation. (3a) In addition, the court held that the imposition of rule 11 sanctions could not bar Cohen's malicious prosecution claim because "Rule 11 cannot abridge the substantive state law of malicious prosecution." (4a)

THE PETITION SHOULD BE DENIED

A. There is No Conflict Among the Circuits

Every federal court which has considered the issue has determined that a motion for Rule 11 sanctions is not a claim of the kind that would trigger application of the doctrine of *res judicata*. There are no reported decisions in which a court has accorded *res judicata* effect to a motion for Rule 11 sanctions.

The Ninth Circuit has specifically held that denial of a Rule 11 motion does not bar a subsequent civil claim for

malicious prosecution. *Amwest Mortgage Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991). In *Amwest*, the defendant in a state court malicious prosecution action sought a federal court injunction to stay the state case based on the federal court's earlier denial of Rule 11 sanctions in the underlying lawsuit. The district court rejected this proposition; the Ninth Circuit affirmed reasoning that a Rule 11 proceeding does not give the parties a fair opportunity to fully litigate the disputed issues.[2]

The Fifth Circuit has similarly held that Rule 11 does not create an independent cause of action for bad faith litigation – *i.e.*, that Rule 11 does not create a "claim" that could trigger application of *res judicata* in a subsequent suit. *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 (5th Cir. 1988). Applying a similar rationale in *Lenoir v. Tannehill*, 660 F. Supp. 42, 44 (S.D. Miss. 1986), the court held that a party cannot counterclaim for Rule 11 sanctions.

The decision below is fully consistent with the *Amwest* and *Port Drum* decisions of the Ninth and Fifth Circuits.

B. The Decision Below is in Accord With This Court's Interpretation of Rule 11

While this Court has not directly addressed the precise issue of whether Rule 11 motions may have *res*

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[2] The Federal District Court for the Eastern District of Pennsylvania has also rejected the argument that an earlier denial of Rule 11 sanctions is a *res judicata* bar to an action for malicious prosecution. *American International Airways, Inc. v. American International Group, Inc.*, Civ. A. No. 90-7135, slip op. (E.D. Pa. May 21, 1991).

judicata effect in a subsequent malicious prosecution lawsuit, the decision below is consistent with this Court's recent interpretations of Rule 11 as a procedural device to deter the filing of baseless lawsuits.

Cooter & Gell v. Hartmarx Corporation, ___ U.S. ___, 110 S. Ct. 2447, 2453 (1990), held that Rule 11 must be interpreted in light of the Rules Enabling Act, 28 U.S.C. § 2072, which allows this Court to adopt procedural rules which do not abridge the litigants' substantive rights.[3] Justice O'Connor, writing for the majority, concluded, "It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts." 110 S. Ct. at 2454. The Court further indicated that the imposition of Rule 11 sanctions would not create a *res judicata* bar against the offending party's underlying claim: "Even if a district court indicated that a complaint was not legally tenable or factually well founded for Rule 11 purposes, the resulting Rule 11 sanction would nevertheless not preclude the refiling of a complaint." 110 S. Ct. at 2456.

In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, 111 S. Ct. 922, 933 (1991), the petitioner argued that Rule 11 violated the Rules Enabling Act because it "effectively creates a federal tort of malicious prosecution, thereby encroaching upon various state law causes of action." This Court rejected petitioner's argument holding:

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[3] The Act expressly provides, 28 U.S.C. § 2072: "Such rules shall not abrige, enlarge or modify any substantive rights. . . . "

> The main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. Imposing monetary sanctions on parties that violate the Rule may confer a benefit on other litigants, but the Rules Enabling Act is not violated by such incidental effects on substantive rights. *Additionally, we are confident that District Courts will resist the temptation to use sanctions as substitutes for tort damages.*

111 S. Ct. at 934 (emphasis added, citations omitted).

Employing a similar rationale in *Chambers v. Nasco, Inc.*, ___ U.S. ___, 111 S.Ct. 2123, 2134 (1991), the Court held that Rule 11 and other statutes and rules providing for sanctions do not displace a court's common law inherent power to impose sanctions for bad faith conduct. *See also Port Drum*, 852 F.2d at 150 (Rule 11 "is no more a 'law' under which a cause of action may arise than are its companion rules"); *Chris & Todd, Inc. v. Arkansas Department of Finance & Administration*, 125 F.R.D. 491, 493-94 (E.D. Ark. 1989) ("Rule 11 sanctions are not to be deemed a substitute for an action for malicious prosecution").

C. The Decision Below Correctly Applied Traditional Notions Of Res Judicata

(1) Essentially disregarding the cases discussed above, petitioners have attempted to create a conflict by arguing that the Eighth Circuit ignored a substantial body of law regarding the doctrine of *res judicata*. That argument is not well taken.

Under the doctrine of *res judicata*, "[a] final judgment on the merits of an action precludes that parties or their

privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). In the instant case, Missouri law, which governs Cohen's malicious prosecution claim, does not permit counterclaims for malicious prosecution. *Wright v. Mullen*, 659 S.W.2d 261, 263 (Mo. App. 1983). Therefore, Cohen's claim did not even accrue until the litigation was terminated in his favor and the *Bastien* plaintiffs' appeals were decided. *Ripley v. Bank of Skidmore*, 355 Mo. 897, 198 S.W.2d 861, 866 (Mo. 1947); *Stix & Co. v. First Missouri Bank & Trust Co.*, 564 S.W.2d 67, 70 (Mo. App. 1978). Respondent's malicious prosecution claim, in short, could not have been adjudicated in the *Bastien* case.

(2) In addition, a proceeding for the imposition of Rule 11 sanctions is entirely different than a suit for an award of malicious prosecution damages. Rule 11 is an exclusively federal remedy which must be invoked by filing a motion in a pending lawsuit or by the court, *sua sponte*. *See, e.g., Lyles v. K Mart Corp.*, 703 F. Supp. 435 (W.D.N.C. 1989). Malicious prosecution is a state common law tort which must be brought by civil complaint.

Under Missouri law, a malicious prosecution claimant is entitled to the normal range of discovery options, pretrial motions practice, and a trial by jury. *Haswell v. Liberty Mutual Insurance Co.*, 557 S.W.2d 628 (Mo. 1977). In contrast, a motion for Rule 11 sanctions must be determined at a hearing (not a trial) by a judge (not a jury) with limited or no discovery. (132a). *See Shelton v. American Motors*, 805 F.2d 1323 (8th Cir. 1986). It was these procedural differences between a Rule 11 motion and a civil tort lawsuit which led the Ninth Circuit to conclude

that Rule 11 proceedings do not have a *res judicata* effect in a subsequent action for malicious prosecution. *Amwest v. Grady*, 925 F.2d at 1165.

(3) There are also fundamental differences in the allowable relief under Rule 11 and in a malicious prosecution suit. Malicious prosecution is a tort action, the purpose of which is to fully compensate the plaintiff for injuries suffered as a result of wrongfully initiated litigation. Once the elements of the tort are established, the plaintiff is entitled to recover all losses caused by the wrongful lawsuit, including attorneys' fees and consequential damages. *Haswell*, 557 S.W.2d at 637-638. If malice is proved, the plaintiff has the right to ask the jury for a punitive damage award as well. *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684, 687 (Mo. 1986) (en banc).

By way of contrast, Rule 11's "central purpose . . . is to deter baseless filings in District Court. . . . " *Cooter & Gell*, 110 S. Ct. at 2454. "Rule 11 is not a fee-shifting statute. . . . A movant under Rule 11 has no entitlement to [attorney's] fees or any other sanction. . . . " *Cooter & Gell*, 110 S.Ct. at 2462 (quoting American Judicature Society, Rule 11 Transition, The Report of the Third Circuit Task Force on Federal Rules of Civil Procedure 11, at 49 Burbank 1989).

> Rule 11 sanctions are not to be deemed a substitute for an action for malicious prosecution. Such sanctions are not intended to make the moving party 'whole' for any and all damages he or she may have sustained by virtue of the malicious prosecution of a meritless claim.

Chris & Todd, Inc., 125 F.R.D. at 493-494 (E.D. Ark. 1989).

In fact, appropriate relief under Rule 11 includes non-monetary sanctions, *e.g.*, oral warnings, *Taylor v. Pennsylvania*, 686 F. Supp. 492, 503 (M.D. Pa. 1988); reprimands in open court, *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839, 842 (1st Cir. 1990); public censure, *Pony Express Courier Corporation of America v. Pony Express Delivery Service*, 872 F.2d 317, 319 (9th Cir. 1989); compulsory education, *Henderson v. Dept. of Public Safety*, 901 F.2d 1288, 1291 (5th Cir. 1990); dismissal of the complaint, *Murray v. Dominick Corporation of Canada, Ltd.*, 117 F.R.D. 512 (S.D.N.Y. 1987); and injunctions against filing additional suits without the court's permission, *Damiani v. Adams*, 657 F. Supp. 1409 (S.D. Cal. 1987).

The permissible monetary sanctions under the rule may fall short of full compensation and cannot include consequential damages. *Business Guides*, 111 S. Ct. at 934. As happened in the instant case, many courts have ordered that the aggrieved party be paid less than its reasonable attorney's fees, *e.g.*, *Hilton Hotels Corp. v. Banov*, 899 F.2d 40 (D.C. Cir. 1990) ($5,000 sanction imposed although $68,000 in legal fees had been incurred); *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 393 (2nd Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 563 (1989) ($10,000 sanction, $48,000 in legal fees); *Stewart v. American International Oil & Gas Co.*, 845 F.2d 196, 202 (9th Cir. 1988); *Unified Services Funds v. Ward*, 121 F.R.D. 673, 678 (D. Alaska 1988); *Doe v. Keane*, 117 F.R.D. 103 (W.D. Mich. 1987); *Muraoka v. American Osteopathic Association*, 117 F.R.D. 616 (N.D. Ill. 1987) (50% or less of the aggrieved parties' fees).

The above decisions are specific illustrations of the principle that compensation or fee-shifting is not the purpose of Rule 11 sanctions. See *Cooter & Gell*, 110 S. Ct. at 2462. *Accord, White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990); *Spiller v. Ella Smithers Geriatric Center*, 919 F.2d 339, 347 (5th Cir. 1990); *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1607 (1991); *Traina v. United States*, 911 F.2d 1155, 1158 (5th Cir. 1990); *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989); *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 194 (3rd Cir. 1988); *Brown v. Federation of State Medical Boards*, 830 F.2d 1429, 1437 (7th Cir. 1987).

In sum, the remedial discretion of a judge in assessing sanctions to deter baseless litigation fundamentally differentiates a Rule 11 proceeding from a tort action for malicious prosecution, where full compensatory damages must be awarded – even to the extent of shifting all of the plaintiff's attorney's fees to the malicious prosecution defendant. The decision below correctly applied that distinction.

CONCLUSION

The petition for a writ of certiorari should be denied.

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